KAM MAH THEATRE SDN. BHD.

v.

TAN LAY SOON

SUPREME COURT, KUALA LUMPUR
TUN DATO' SERI HAJI ABDUL HAMID BIN HAJI OMAR LP,
DATO' PEH SWEE CHIN SCJ,
TAN SIR DATO' MOHD EUSOFF BIN CHIN SCJ
[CIVIL APPEAL NO. 02-285-93]
9 NOVEMBER 1993

CONTRACT: Parties entering into negotiations for sale and purchase of land - Whether there was in fact a valid and binding contract - Whether agreement for sale and purchase was provisional upon execution of formal contract - Whether there was cogent evidence to displace presumption that formal contract was necessary - Propriety of adducing evidence, oral or otherwise, of surrounding circumstances, background and negotiations between parties in construing proper interpretation of document.

The plaintiff entered into negotiations with the defendant in 1989 for the sale of certain pieces of land. The plaintiff claimed that there was a concluded contract on the basis of a letter (the document) written by the defendant and sued for specific performance of the contract on the defendant's failure to proceed with the sale.

The document stated to the effect that the sale and purchase agreement was to be signed on or before 18 March 1989 and provided that the said sale and purchase agreement shall incorporate all the terms in the document and other usual terms and conditions. The document further provided that in the event the sale and purchase agreement was not signed by the cut-off date, the amount of deposit paid by the plaintiff shall be refunded without demand.

The learned trial Judge held that the document was an enforceable agreement and ordered specific performance of the said document and the usual consequential orders and directions. The defendant appealed further.

Held:

[1] The document would have to be considered and construed for its proper meaning and effect, the most important being the proper interpretation of the said document itself, against the background of the circumstances in which the parties have been negotiating, including in those circumstances the provisions of any applicable law.

[2] The proviso to condition No. 3 in the document, to which the sale of the said land would be subject, postulated very clearly the making of a sale and purchase agreement that would also include other "usual terms and conditions". The term "usual terms and conditions" remained largely a matter of conjecture and would create uncertainty unless a contract containing these agreed "usual terms and conditions" had been signed by the parties. In the circumstances the proviso would have the same effect as if the formula "subject to contract" had been in the said document.

[3] The formula of "subject to contract" gives rise to a strong presumption of the necessity of a further formal contract and it requires cogent evidence to displace this strong presumption. There was no such cogent evidence in the present case.

[4] In the circumstances there was no contract at all because the said document was dependant on the signing of a formal contract to be further negotiated and approved by both parties. In addition the words "usual terms and conditions" in the proviso to the document failed to reveal certainty and were too ambiguous to evince a definite meaning on which the Court could safely act.

[Appeal allowed with costs].

[Bahasa Malaysia Translation of Headnote]

KONTRAK: Pihak-pihak memasuki rundingan untuk jual-beli tanah - Sama ada sebenarnya terdapat kontrak yang sah dan mengikat - Sama ada perjanjian untuk jual-beli adalah bersyarat atas perlaksanaan kontrak rasmi - Sama ada terdapat bukti yang menyakinkan untuk menyingkirkan anggapan bahawa kontrak rasmi adalah diperlukan - Kewajaran mengemukakan keterangan, lisan atau sebaliknya, mengenai keadaan-keadaan yang mengelilingnya, latarbelakang dan rundingan-rundingan di antara pihak-pihak dalam mentafsirkan dokumen atas pentafsiran yang betul.

Plaintif memasuki rundingan dengan defendan dalam tahun 1989 bagi menjual beberapa bidang tanah. Plaintif mendakwa bahawa terdapat kontrak yang mengikat berdasarkan kepada sepucuk surat (dokumen tersebut) yang ditulis oleh defendan dan disaman bagi pelaksanaan spesifik akan kontrak tersebut atas kegagalan

defendan untuk meneruskan dengan jualan berkenaan.

Dokumen tersebut menyebutkan bahawa perjanjian jual-beli sepatutnya ditandatangani pada atau sebelum 18 Mac 1989 dan dengan syarat bahawa perjanjian jual-beli tersebut hendaklah memaktubkan segala terma dalam dokumen tersebut dan lain-lain terma dan syarat-syarat yang biasa. Seterusnya dokumen tersebut mensyaratkan bahawa sekiranya perjanjian jual-beli tidak ditandatangani menjelang tarikh tersebut, deposit yang dibayar oleh plaintif akan dikembalikan tanpa tuntutan.

Hakim yang bijaksana tersebut telah memutuskan bahawa dokumen tersebut merupakan perjanjian yang berkuatkuasa dan memerintahkan pelaksanaan spesifik akan dokumen tersebut dan perintah-perintah serta arahan-arahan berbangkit yang biasa. Defendan membuat rayuan seterusnya.

Diputuskan:

[1] Dokumen tersebut hendaklah dipertimbangkan dan ditafsirkan bagi maksud dan kesannya yang betul, dimana yang pentingnya ialah pentafsiran betul akan dokumen itu sendiri, dengan mengambil kira latarbelakang keadaan di mana pihak-pihak tersebut membuat rundingan, termasuklah dalam keadaan di mana peruntukan mana-mana undang-undang yang terpakai.

[2] Proviso kepada syarat No. 3 dalam dokumen tersebut, kepada mana jualan tanah tersebut adalah tertakluk, mengandaikan dengan jelas sekali pembuatan perjanjian jual-beli yang juga akan menyertakan lain-lain "terma dan syarat-syarat biasa". Perkataan lain-lain "terma dan syarat-syarat biasa" tetap merupakan sesuatu yang diandaikan dan akan mewujudkan ketidakpastian melainkan suatu kontrak yang mengandungi "terma dan syarat-syarat biasa" ditandatangani oleh pihak-pihak tersebut. Dalam hal ini, proviso tersebut akan mempunyai kesan yang sama seolah-olah rumusan "tertakluk kepada kontrak" termaktub dalam dokumen tersebut.

[3] Rumusan "tertakluk kepada kontrak" memberi ruang kepada anggapan yang kuat akan keperluan suatu kontrak rasmi lanjutan dan ia memerlukan bukti yang meyakinkan untuk menyingkirkan andaian yang kuat ini. Tiada sebarang keterangan yang meyakinkan terdapat dalam kes ini.

[4] Dalam keadaan ini tidak terdapat sebarang kontrak langsung kerana dokumen tersebut bergantung kepada kontrak rasmi yang perlu ditandatangani dan yang mana akan dirundingkan seterusnya dan diluluskan oleh kedua-dua pihak. Tambahan lagi perkataan "terma dan syarat-syarat biasa" dalam proviso kepada dokumen tersebut gagal mendedahkan kepastian dan terlalu samar untuk menunjukkan maksud yang nyata atas mana Mahkamah dapat bertindak dengan selamatnya.

[Rayuan dibenarkan dengan kos].

Cases referred to:

Penn v. Simmonds [1971] 1 WLR 1385 ***(refd)***
Hussey v. Horne-Payne [1879] 4 App. Cas. 311 at 316 ***(refd)***
Daiman Development Sdn. Bhd. v. Lui Chin Teck, Mathew [1981] 1 MLJ 56 at 58 ***(refd)***
Winn v. Bull [1877] 7 Ch. D 9 ***(refd)***
Derby & Co. Ltd. v. ITC Pension Trust Ltd. [1977] 2 All ER 890 ***(refd)***
Scammell v. Ouston [1941] AC 251 ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 91 & 92

For the appellant - Wong Kim Fatt (Christina Chia with him); M/s. Christina Chia Ng & Partners
For the respondent - R.R. Sethu; M/s. L.S. Tan & Co.

JUDGMENT

Peh Swee Chin SCJ:

We had allowed the appeal earlier making also certain consequential orders and we now give our reasons.

The appeal arose out of one of those frequent transactions in which parties have negotiated with each other where one party alleges they have reached a definite binding agreement while the other alleges to the contrary *viz*., they were then still negotiating with each other. In the instant case, the learned trial Judge found a binding and concluded agreement and we differed, hence the appeal was allowed.

The plaintiff, a solicitor in fact practising under the name and style of L.S. Tan & Co., claimed specific performance of an agreement for the sale to him of a few pieces of land by the defendant, (hereafter the said land), the said agreement had been said to be made by a document in the form of a letter dated 10 March 1989 and addressed to the name of the plaintiff's legal firm, (hereafter the said document). It is to

be borne in mind that in all the correspondence and the said document, the name of "L.S. Tan & Co." was used instead of the plaintiff's personal name, though in two different drafts of the agreement of sale and purchase to be dealt with later, the plaintiff's personal name was used. Both parties appeared to have tacitly agreed that the use of the name of the legal firm of plaintiff was meant to refer to plaintiff, so it should be so regarded.

The said document dated 10 March 1989 is set out below:

Kam Mah Theatre Sendirian Berhad
360 (2nd Floor) Jalan Raja Laut
Tiong Nam Settlement, Kuala Lumpur

10 March 1989

Our Ref. YCC/AFY/nbl

M/s. L.S. Tan & Co.
11 Jalan Cheng Lock
50000 Kuala Lumpur

Attention: Mr. L.S. Tan

Dear Sirs,

Lot Nos. 1095, 1610 & 1611, Mukim 12, South West District, Penang

This letter serves to confirm that we have agreed to sell the following properties:

	Particulars of Title	Pegangan No.	Gross Area before surrender (sq. ft.)	Net Area after surrender (sq. ft.)
1.	Perakuan Pendahuluan Mengenai Hakmilik (Advance Certificate of Title) Mukim 12, Daerah Barat Daya, Balik Pulau Negeri Pulau Pinang	1095	106,412	84,961
2.	"	1610	111, 895	98,553
3.	"	1611	125,507	17,362
		Total	343,814	200,876 (approx.)

to you as trustee at Malaysian Ringgit Nine (RM9) only per square foot of the total net saleable area of 200,876 (more or less) square feet in consideration of your payment of a deposit sum of Malaysian Ringgit Ninety Thousand Three Hundred and Ninety Four and Cents Twenty (RM90,394.20) the receipt of which is hereby acknowledged upon terms and conditions as follows:

1. that the purchase price is at Malaysian Ringgit Nine (RM9) only per square foot of the net saleable area of 200,876 (more or less) square feet
2. that the aforesaid lands shall be free from all encumbrances
3. that the purchase price shall be paid as follows:
   (i) 15% of the purchase price on or before 18 March 1989 (which shall include the 5% paid hereinbefore)
   (ii) another 30% of the purchase price on or before 18 April 1989
   (iii) another 30% of the purchase price on or before 18 May 1989
   (iv) another 25% of the purchase price on or before 18 June 1989

provided that the sale and purchase agreement shall incorporate all the terms and conditions herein and other usual terms and conditions and shall be signed on or before 18 March 1989 otherwise the aforesaid sum of RM90,394.20 (equivalent to 5% of the purchase price) shall be refunded to you free of interest without demand forthwith.

4. that the vendor' solicitor shall be stakeholder for 5% of the purchase price for the payment of Real Property Gain Tax (if any) and the vendor shall provide a bank guarantee to the purchaser's solicitor
5. that the purchaser's solicitor is authorised to pay the total proceeds of the sale to Malayan United Finance Berhad or any financial institution for the purpose of discharging the aforesaid properties for completion of sale and purchase of the aforesaid properties. In the event that the payment of the aforementioned sum is insufficient to redeem the said properties from the said finance company or any financial institution, then the vendor will pay the additional sum for the purpose of enabling the aforesaid properties to be discharged and redeemed from Malayan United Finance Berhad and or other financial institution
6. all payments will be paid in accordance to the schedule above referred to. Any default in payment in accordance to the schedule above written, the vendor is entitled to forfeit the sum equivalent 10% of the purchase price
7. that each party shall bear their own respective solicitors' cost
8. that all stamp fees and registration fees for the transfer of the properties shall be borne by the purchaser

9. that the vendor shall bear all incidental charges costs and expenses for securing the discharges of the charges to Malayan United Finance Berhad in respect of the properties.

Yours faithfully
Kam Mah Theatre Sendirian Berhad

Sgd
Yap Chin Chuan
(Authorised Representative)

We will set out the background and circumstances surrounding the said document including the correspondence that passed between the parties after the date of the said letter, all of which we had to consider and did consider. The relevance or propriety for taking these matters into consideration will be dealt with by us later at a more appropriate and convenient stage.

On 10 March 1989, the plaintiff accompanied by PW2 met the authorized representative of the defendant to purchase the said land and they negotiated and as a result the said document was drafted and signed by the defendant through its "authorized representative".

On the following day *viz.* 11 March 1989, with reference to the proviso contained in condition No. 3 stated in the said document about signing the sale and purchase agreement on or before 18 March 1989, the plaintiff forwarded a draft of such agreement to the defendant's solicitors together with a cheque for RM90,394.20 made out in the name of the said solicitors. The receipt of this sum was already earlier acknowledged by the defendant in the said document. The learned Judge made a finding from the evidence that the cheque was given to the defendant on 10 March 1989. Nothing really turned on this finding, as both parties were relying heavily on other aspects of the case; they seemed to comment on this finding rather perfunctorily. This Court would bear in mind in any event the fact that this deposit was paid in pursuance of the said document.

On 15 March 1989, the plaintiff wrote to the defendant's solicitors stating they were obliged to point out that the sale and purchase agreement was to be approved and executed on or before Saturday, 18 March, 1989.

On 18 March 1989, the plaintiff wrote to the defendant's solicitors, enclosing 2 cheques to make up the amount of 15% of the purchase price; (credit was given to the said sum of RM90,030.20 mentioned earlier in so making up the said amount of the said 5%) as required in condition 3(i) of the said document and also a sale and purchase agreement in quadruplicate which were only and already signed by the plaintiff beforehand and which were different from the earlier draft agreement in respect of at least 2 conditions or terms (and which are referred to hereafter as the agreement signed only by the plaintiff).

The first difference was that for the first time, the agreement signed only by plaintiff, contained in clause 3 a requirement of defendant's solicitors giving a written undertaking "to secure the registrable discharge of the said charge". The charge was referred to in the earlier draft agreement as having been registered against the said land in favour of one "Malayan United Finance Berhad", the chargee.

The other notable difference was in clause 17 of the agreement signed only by the plaintiff which was a new clause about the appointment of a surveyor to survey the said land with the adjustment in price for any difference found at the same agreed price of RM9 per sq. ft. stating that if the defendant did not agree with the survey, that the said land would then be re-surveyed by "an independent surveyor" to be appointed by the "mutual agreement" of both parties etc.

On the same day, defendant's solicitors wrote to the plaintiff saying that they would take instructions on clauses 3 and 17 mentioned above. The plaintiff, further wrote again on the same day to the defendant's solicitors acknowledging the receipt of the latter's letter, asking at the same time (a) for a copy of the "redemption advice" from the said Malayan United Finance Berhad and (b) for "sight of advice of withdrawal notice of (compulsory) acquisition of 6000 sq. ft. by the authority in question". This had reference to para 1 of the preamble of the first draft agreement stating that a portion of the said land amounting to 136,938 sq. ft. had been acquired by the State Government leaving a balance of 206,876 sq. ft. more or less, the latter area being the subject matter of sale.

On 23 March 1989, the defendant's solicitors wrote to the plaintiff stating on instructions from their clients, that they did not agree to the conditions of the proposed agreement and they refused and refunded all the money the defendant had received from the plaintiff, including the sum of RM90,394.20 the receipt of which was acknowledged in said document.

The finding of the learned Judge was that the said document was an enforceable agreement. His Lordship held to the effect that all the terms or conditions other than those stated in the said document were merely usual terms and conditions as referred in the proviso to condition No. 3 in the said document, as the condition regarding the requirement of an undertaking by the defendant's solicitors was not of importance to the contract; the plaintiff and the defendant could be expected to resolve their disagreement on this. About the additional new term concerning survey and adjustment of the price, his Lordship held that it was a usual term and condition (as referred to in the said document) though more significant than the term about the requirement of the solicitors' undertaking.

In the event that had happened, the lower Court ordered specific performance of the said document and the usual consequential orders and directions. (See [1994] 1 CLJ 85).

It ought to be pointed out at this stage that on 3 January 1991, prior to the hearing at the lower Court of the action, the lower Court made an order on an application made by the plaintiff, after hearing both parties, for the plaintiff to pay "redemption sums direct to the Malayan United Finance Berhad"; for the titles to the said land after their release by the chargee, to be retained in Court and for all the money and expenses in this connection to be dealt with at the trial. The defendant then appealed to the Supreme Court against this order and at the hearing before the Supreme Court, the appeal against that payment of "redemption" sum was withdrawn. A sum of about RM2.48 million was in fact paid to the chargee *viz.* Malayan United Finance Berhad by the plaintiff pursuant to that order.

The judgment of the lower Court was, of course, seriously criticized, as to be expected, by the appellant *viz.* the defendant and we now deal with our grounds for allowing the appeal.

First, about the propriety of evidence, oral or otherwise of surrounding circumstances, background and negotiations between parties in a case like the instant one, such evidence is admissible and relevant to show that there was no contract at all or in other words, there was no concluded and binding agreement at all, for ss. 91 and 92 of the Evidence Act 1950 merely strike at evidence to contradict, vary, etc. the terms of an established contract, for in that event, such evidence would be unacceptable. The position generally is the same in England for an established contract, thus e.g. in *Penn v. Simmonds* [1971] 1 WLR, p. 1385 Lord Wilberforce said:

> In my opinion, the evidence of negotiation or of parties' intention ... ought not to be received.

For correspondence that passed after the date of the said document, it was relevant also, for in finding whether there was any contract at all, the Court must look at the correspondence as a whole, please see decision of House of Lords in *Hussey v. Horne-Payne* [1879] 4 App. Cas. 311 at p. 316.

Speaking about such surrounding circumstances in the Privy Council in *Daiman Development Sdn. Bhd. v. Lui Chin Teck, Mathew*, [1981] 1 MLJ 56, p. 58 Sir Garfield Barwick said:

> The question whether parties have entered into contractual relationships with each other essentially depends upon the proper understanding of the expressions they have employed in communicating with each other considered against the background of the circumstances in which they have been negotiating, including in those circumstances the provisions of any applicable law. Where they have expressed themselves in writing the proper construction of the writing against the background will answer the question.

Against such background of surrounding circumstances, the said document would have to be considered and construed for its proper meaning and effect, the most important aspect being the proper interpretation of the said document itself. In this connection, a comparison of decided cases will usually yield certain principles sometimes, but often it will not be very helpful and is even apt to lead to confusion.

Looking at the said document, one was struck immediately by a proviso contained therein, a proviso very similar to the phrase or formula of "subject to contract" which conveyancing lawyers are prone to employ. There need not be the very words of the said formula in order to have the usual effect arising from the use of such formula; similar phrase or words would achieve the same result, as shown in numerous past cases. Just to quote one example; in *Winn v. Bull* [1877] 7 Ch. D 9, the words used were: "subject to the preparation and approval of a formal contract", they were treated as having the same effect as if the formula of "subject to contract" were used.

In connection with the proviso contained in condition No. 3 of the said document, the question arose as to whether that proviso in our view would be equivalent to having the formula of "subject to contract" inserted in the said document.

First, the proviso stated as a proviso to condition No. 3, to which the sale of the said land would be subject, postulated very clearly the making of a sale and purchase agreement that would also include other "usual terms and conditions". What would be the usual terms and conditions remained largely a matter of conjecture, thus the words would create uncertainty unless a contract containing these agreed "usual terms and conditions" had been signed by the parties. Then again, the proviso to condition No. 3 further stated that the agreement had to be signed on or before 18 March 1989 failing which the deposit of RM90,394.20 would be refunded to the plaintiff free of interest - without demand. We were of the view therefore that the proviso would have the same effect as if the formula of "subject to contract" had been in the said document. We now elaborate the formula.

It is settled that the formula of "subject to contract" gives rise to a strong presumption of the necessity of a further formal contract, "formal" be it noted, is not to be understood in the common parlance as being just a "mere formality" of no importance. As Sir Garfield Barwick who delivered the opinion in *Daiman* said:

> But in general, employment of the formula subject to contract as a condition of their arrangement will preclude the present assumption by the parties of contractual obligations.

We did not think it necessary to set out here a great number of past cases to illustrate such similar effect, and we think that just mentioning one of the more recent cases in addition to the case of *Winn v. Bull, supra,* will suffice; that extra case is *Derby & Co. Ltd. v. ITC Pension Trust Ltd.* [1977] 2 All ER 890]. From the host of such past cases, the principle is clear, it requires cogent evidence to displace this strong presumption. This Court enquired: Was there such cogent evidence?

First, in regard to the payment by the plaintiff of some RM2.48 million paid by the plaintiff on behalf of the defendant to the chargee of the said land in order to obtain the release of the titles to the said land, this was not paid at the request, or with connivance of the defendant but it was paid after the plaintiff had obtained a Court order to do so, the order having been made after hearing the objection to the order from the defendant, who subsequently appealed, but who withdrew the appeal at the last minute, presumably more concerned with chances of lack of prospect of success of their appeal than their agreeability to the idea of the plaintiff paying the sums owing to the chargee in the first place.

The payment of deposit (RM90,394.20), the receipt of which was acknowledged in the said document, which normally would have been a significant indication, was watered down by the further provision of the return of the deposit on failure of the parties to sign the contract by 18 March 1989. This differed, not without any significance from *Daiman supra,* in which the booking fee in the booking document for a new house was stated to be liable to be forfeited for failure to sign a later agreement, and in which the Privy Council confirmed, after considering all other matters in the case, that the booking document was a valid contract by itself.

This Court considered also that the 1st draft agreement, before it was even approved by the defendant's solicitors, was followed by the four copies of agreement signed by the plaintiff only, with the latter containing 2 more conditions about the solicitors' undertaking and the survey of the land; a situation highly indicative of an ongoing negotiation.

The Court considered also that there could even be a further amended draft of the ultimate agreement to take account of withdrawal in respect of about 6000 sq. ft., of compulsory acquisition by the relevant authorities as appeared from some part of the correspondence referred to above. This would seem to exude an air of lack of finality.

The Court also considered the starting words of the said document confirming that the defendant had agreed to sell the said land. For the defendant to argue with certainty about the finality of these words would be just merely begging the question in view of the proviso discussed above.

The Court also considered the correspondence after the date of the said document, again suggesting negotiation.

We were of the view there was no contract at all, because we found that the said document was dependent on the signing of a formal contract to

be further negotiated and approved by both parties. On this ground alone we would allow the appeal. There was another ground on which we would have equally allowed the appeal.

That other ground for finding there was no contract at all, was that the words in the said proviso - "usual terms and conditions" failed to reveal certainty; they were too ambiguous. For example, in *Scammell v. Ouston* [1941] AC 251], the House of Lords was faced with the clause: "that the balance of purchase price can be had on hire-purchase terms over a period of two years". In that case Mr. Ouston placed an order for purchase of a motor-van from M/s. Scammell who accepted the order. The order was in words including the quoted words. M/s. Scammell changed their minds later and refused to sell. The House of Lords held there was no contract at all, stating that even if the quoted words were considered broadly, they still failed to evince a definite meaning on which the House could safely act. It had transpired from the evidence there, that there was a wide variety of hire-purchase agreements.

We therefore allowed the appeal, setting aside the judgment of the lower Court with a further order that the sum of RM2.48 million or thereabout, paid by the plaintiff to the Malayan United Finance Berhad and further incidental expenses, if not already included therein, be refunded by the defendant to the plaintiff with interest at 6.5% p.a. thereon from the date of plaintiff's payment of the same to the date of repayment to the plaintiff, and that there be liberty to apply generally, further with costs here and below to the appellant and for the deposit of RM500 in Court to be refunded and paid out to the defendant (appellant).